MOTION FILED

FEB 2 8 2000

(16)

No. 99-699

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,
Petitioners,

v.

JAMES DALE,
Respondent,

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

AMICUS CURIAE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all the rights enumerated in the Bill of Rights and the 14th Amendment, not just those that might be politically correct for a time or fit a particular ideology. Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese, former Federal Appeals Court Judge Robert Bork, former Reagan White House Policy Advisor Robert Carleson, who also serves as the organization's chairman, former Director of the U.S. Commission on Civil Rights Linda Chavez, former Assistant Attorney General for Civil Rights William Bradford Reynolds, former Harvard University Professor James Q. Wilson, former Ambassador to Costa Rica Curtin Winsor, Jr., former Editor-in-Chief of the Reader's Digest and former Director of the Voice of America Kenneth Y. Tomlinson, and nationally syndicated columnist Joseph Perkins.

This is precisely the sort of case that is of interest to the ACRU, because we are most concerned about protecting those whose rights and liberties may be overlooked or infringed due to political correctness or other political bias. In this case, we are particularly concerned that the liberty interests of the Boy Scouts to promote their traditional moral values are properly understood.

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[1] Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. Consent to the filing of this brief has been granted by the parties. Their letters of consent are enclosed with this brief.

SUMMARY OF ARGUMENT

The central question in this case is who should choose the leaders and messages of the Boy Scouts of America – the Boy Scouts, or the state, acting at the behest of respondent Dale.

The Boy Scout program advances traditional moral values such as honesty, courage, reverence, hard work, patriotism, thriftiness and others. This also includes traditional family values, emphasizing marriage and fatherhood for the boys. As a result, part of the Boy Scout message is that heterosexual sex before marriage, adultery, and heterosexual promiscuity are all wrong. Concomitantly, part of the message as well is that homosexuality activity is morally wrong and should be avoided.

Respondent Dale opposes this long established Boy Scout position on homosexuality. He is leading a high profile public campaign propounding the opposite of the view of the Boy Scouts regarding homosexual conduct. Indeed, he publicly attacks the Boy Scout view on homosexuality and publicly proclaims his own personal homosexual conduct.

Consequently, if the state forces the Boy Scouts to reappoint Dale as a uniformed adult leader in their organization, an Assistant Scoutmaster, their position regarding homosexual conduct would be completely nullified. Indeed, the entire Boy Scout value system regarding family life and sexual activity would break down.

Moreover, as a uniformed adult Scout leader, Dale would serve as a role model for the boys. The Boy Scouts may properly decide that they do not want a gay activist as a role model for their boys, even if the Scouts did not otherwise wish to teach the boys moral values regarding sexual conduct. In other words, even apart from Dale interfering with the affirmative messages the Scouts want to send, the Scouts may also decide that they just do not want to

send the messages that accepting Dale as a uniformed adult Scout leader would send.

Dale may engage in whatever personal conduct he desires. He may publicly advocate the views and values in which he believes. He may openly criticize the Boy Scouts and the values they espouse. But what he may not do is impose his own views and values on the Boy Scouts by forcing them to accept him as a uniformed adult leader, an Assistant Scoutmaster, despite his openly expressed views and conduct directly contradicting the values the organization seeks to express. Yet, that is precisely what Dale seeks in this case and that is the result of the decision below.

We believe that the decision below sets a dangerous precedent that threatens the very freedom of citizens to join together in private voluntary organizations to advance traditional moral values. If the decision is affirmed, then apparently we have reached the point in America where parents and socially minded citizens cannot join together to form an organization to teach boys traditional moral values, including that they should not engage in homosexual activity and that it would be morally wrong for them to do so.

Moreover, we think the decision below threatens promotion of traditional values across the board, not just those regarding homosexuality. Indeed, the decision of the court below, and the doctrine advanced by Dale in this Court, would establish a foundation for suppressing the freedom of all citizens to form private voluntary organizations to advance the moral principles in which they believe. It would constrain them instead towards advancing only the politically correct moral principles approved by the state.

Based on this analysis, the decision of the court below would violate the Constitution in at least three ways. First, the ruling violates the freedom of speech of the Boy Scouts. Secondly, the decision violates the right to expressive

association by the Boy Scouts. Thirdly, the decision violates the Boy Scouts' right to intimate association.

Respondent Dale has no interest in serving as a Boy Scout leader that would remotely come close to outweighing these core liberty interests of the Boy Scouts. The Boy Scout organization is for the boys, not for the adult Scout leaders. It is not a vehicle for the Scout leaders to advance their personal interests or agendas, or to pursue commercial or business interests or activities. Indeed, the only interest Dale has asserted in seeking to force his acceptance as a Scout leader is his desire to impose his own, differing values on the organization. He says that through his forced leadership he wants to point out to the organization "how bad and wrong" their policy regarding homosexuality is. That is not a valid, legitimate interest to outweigh the liberty interests of the Boy Scouts discussed above.

ARGUMENT

I. THE DECISION BELOW VIOLATES THE CONSTITUTIONALLY PROTECTED RIGHTS OF FREEDOM OF SPEECH AND FREEDOM OF ASSOCIATION OF THE BOY SCOUTS OF AMERICA

A. The Decision Below Threatens the Freedom of All Americans to Join Together to Advance Traditional Moral Values or Any Other Beliefs

This is not a gay rights case, properly understood. No law or action of the state restricts the rights or liberties of respondent James Dale in any way. Rather, this case is about who should choose the leaders and messages of the Boy Scouts of America – the Boy Scouts, or the state, acting at the behest of respondent Dale.

The Boy Scout program is not primarily social or recreational. Courts have long recognized that the point of

the program is to teach boys sound moral values, with its various activities all geared to reinforce that central goal. *Curran v. Mount Diablo Council of the Boy Scouts of America*, 17 Cal.4th 670, 697, 952 P.2d 218, 236 (1998) (The Boy Scouts is a "charitable, expressive, and social organization" whose "primary function is the inculcation of a specific set of values in its youth members, and whose recreational facilities and activities are complementary to the organization's primary purpose.").

The Boy Scout program advances traditional moral values such as honesty, courage, reverence, hard work, patriotism, thriftiness, and others. This also includes traditional family values, emphasizing marriage and fatherhood for the boys. As a result, part of the Boy Scout message is that heterosexual sex before marriage, adultery, and heterosexual promiscuity are all wrong. Concomitantly, part of the message as well is that homosexual activity is morally wrong.

The Boy Scouts are not outsiders to the boys. Fathers are also involved in the program and its various activities, often volunteering to serve as local adult leaders. Neighbors and fellow church members also often serve in the local leadership pool.

Respondent Dale opposes the long established Boy Scout view that homosexual conduct is wrong and should be avoided. As Co-President of the Rutgers University Lesbian/Gay Alliance, Dale is, in fact, leading a high profile public campaign propounding the opposite of the view of the Boy Scouts regarding homosexual conduct. (JA 495-98; JA 503-04.)[2] Indeed, Dale publicly attacks the Boy Scout view on homosexuality. He states that he owes it to the Boy Scouts "to point out to them how bad and wrong" their position on homosexuality is. He also publicly proclaims that he personally engages in homosexual conduct.

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[2] Numbers preceded by "JA" refer to pages in the Joint Appendix filed in this case. Numbers followed by "a" refer to pages in the bound Appendix submitted with the Petition for Writ of Certiorari.

Consequently, for the Boy Scouts to accept Dale as a uniformed adult leader in their organization, an Assistant Scoutmaster, would completely nullify their position regarding homosexual conduct. It would send a clear message to all of the boys that the Boy Scout moral values regarding homosexual conduct are not to be taken seriously. And if nonmarital homosexual conduct is acceptable, then how can premarital heterosexual conduct not be? Indeed, if adult Boy Scout leaders can be active homosexuals publicly advocating that lifestyle, how can the Boy Scouts effectively maintain teachings regarding marriage and fatherhood? Certainly, these leaders could not propound that message and their presence in the organization would directly contradict it. As a result, the entire Boy Scout value system regarding family life and sexual activity would break down.

Moreover, even apart from the moral value system the Boy Scouts seek to promote, forcing the Boy Scouts to accept Dale as a uniformed adult leader creates another problem. For as an adult Scout leader, Dale would serve as a role model for the boys. The Boy Scouts may properly decide that they do not want a gay activist as a role model for their boys, even if the Scouts did not otherwise wish to teach the boys moral values regarding sexual conduct. In other words, even apart from Dale interfering with the affirmative messages the Scouts want to send, the Scouts may also decide that they just do not want to send the messages that accepting Dale as an adult Scout leader would send. This is exactly the position taken by this Court in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), discussed further below.

Dale may engage in whatever personal conduct he desires. He may publicly advocate the views and values in which he believes. He may openly criticize the Boy Scouts and the values they espouse. These are his valid civil rights.

But what Dale may not do is impose his own views and values on the Boy Scouts by forcing them to accept him as a uniformed adult leader, an Assistant Scoutmaster, despite his

openly expressed views and conduct directly contradicting the values the organization seeks to express. *Roberts v. United States Jaycees,* 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an organization than a regulation that forces the group to accept members it does not desire.").

Yet, that is precisely what Dale seeks in this case and that is the result of the decision of the court below. The right or liberty interest that Dale asserts in this case is the freedom to impose his own values and views on an unwilling Boy Scout organization.

This is further illustrated in Dale's brief opposing the granting of certiorari in this case.[3] In that brief, respondent Dale and his representatives seek to redefine the message of the Boy Scouts, denying that the organization has any view regarding homosexuality. Brief in Opp. 9-17. Indeed, Dale argues that it is his exclusion from the Boy Scouts that violates the Scout Oath and Law. Brief in Opp. 12 n.8. Consequently, Dale seeks to impose his own interpretation of the Scout Oath and Law and his own values on the Boy Scouts.[4]

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[3] Brief in Opposition, *Boy Scouts of America v. James Dale*, No. 99-699, November 24, 1999 (hereafter "Brief in Opp.").

[4] Dale's brief also tediously repeats over and over that the Boy Scout position and message regarding homosexuality described by the Scouts in this case is "anti-gay" and a message requiring or involving discrimination. Brief in Opp. 2n.3, 4, 9, 11, 16, 24, 25, 30n.21. But this language just amounts to further denunciation of the traditional moral values the Boy Scouts seek to communicate and support. The Boy Scout viewpoint and message regarding homosexuality is not anti-gay, nor does it involve discrimination to the extent that word is defined to involve unjust or invidious treatment. The Boy Scouts are not interested in attacking or criticizing gay people in any way. Rather, through the Boy Scouts, parents, their neighbors, and fellow church members simply seek to communicate to their children the traditional moral values that homosexuality, as well as heterosexual sex outside of marriage, are morally wrong and that they should not engage in such conduct. This is hardly a novel position. It is a view widely and commonly held among

That is shown by the decision of the court below as well. That decision was openly grounded in outright hostility to the moral values espoused by the Boy Scouts. The court actually stated that in its view the position of the Boy Scouts on homosexuality is "based on little more than prejudice" and denounced it as "bigotry". (59a,61a.) In a concurring opinion, Justice Handler stated that it is "untenable" for the Boy Scouts to remain "entrenched in the social mores that existed at the time of its inception" (100a), which the court effectively ruled are now outdated and socially unacceptable. Quite simply, the court acted to impose its views and values regarding homosexuality on the Boy Scouts.[5]

The New Jersey court is apparently unaware that tens of millions of Americans believe in the moral values espoused by the Boy Scouts, including the values regarding homosexuality. Millions and millions believe as well that these views regarding homosexual conduct are directly derived from the words of the Bible and Judeo-Christian doctrines. Major religious denominations support this position. To rule that this is simply stupid bigotry is to pit the power of the state against these traditional, religiously based beliefs.

We believe that this decision sets a dangerous precedent that threatens the very freedom of citizens to join together in private voluntary organizations to advance traditional moral values. If the decision is affirmed, then apparently we have reached the point in America where parents and socially minded citizens cannot join together to

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the American people and among many others around the world for hundreds, in fact, thousands of years. Rather than invidious discrimination, the message of the Boy Scouts regarding homosexuality simply involves a constitutionally protected exercise of their rights to freedom of speech and association.

[5] The court stated as well, "Boy Scouts teaches that 'moral fitness' is an individual choice and defers the ultimate definition to its members." (55a). But if that were true, the Boy Scouts would not be an organization aimed at teaching boys moral values at all. Again, the court seeks to define the Boy Scouts in its preferred image.

form an organization to teach boys traditional moral values, including that they should not engage in homosexual activity and that it would be morally wrong for them to do so. Courts can denounce such views as just stupid bigotry, even though they are based on widely subscribed religious doctrines thousands of years old, and force the group to accept gay activists as leaders who will teach the boys by word and deed the opposite view.

Indeed, if traditional values can be legally styled as simple bigotry and prejudice, then how long will it be before actions taken to promote them are declared illegal as well? We do not think it is a far step from the decision below, and from the arguments of respondent Dale, to hold that a group organized to teach such bigoted and prejudiced values to children is, by those very teachings, engaged in illegal discrimination, or activity that could be banned by a supposed civil rights statute, or a statute supposedly preventing child abuse.

Moreover, we think the decision below threatens promotion of traditional values across the board, not just those regarding homosexuality. Any traditional moral values a group seeks to promote may be deemed politically incorrect at some point or may be otherwise disapproved by the state. The doctrine fashioned by the court below, and advanced by Dale here, provides a foundation for the state then to force the group to accept as members and even leaders others who disagree with the organization's values and who will then insist that it promote the politically correct view.

After all, the assailants of the group will argue, are the politically incorrect views really the core expressive purpose of the group? Aren't there dissenters from the politically incorrect view in the organization? Has the group clearly specified their support of the politically incorrect view? Can't the group continue to promote its main central purposes even admitting the dissenters from the politically incorrect view? If the group has had any shyness about

loudly proclaiming a politically incorrect view as one of its main purposes, that may well be fatal to any defense against the assailants. Finally, based on the decision below, the assailants may argue that in any event their civil rights to participate outweigh any expressive purpose of the group.

Ultimately, such a doctrine threatens the rights of everyone. For if groups promoting traditional values can be constrained towards promoting only the values approved by the state, this will ultimately be true for every other group as well, including groups of antiwar activists, draft protestors, anti-tax agitators, and even gay and lesbian groups. As political climates shift, any group with a politically incorrect view can be assaulted by the acolytes of political correctness, on the basis of the doctrines advanced by Dale and accepted by the court below. If today the Boy Scouts can be forced to accept a homosexual activist as an adult leader, then under a different political climate a gay/lesbian group officially recognized at a public university may be forced to accept as members or even leaders fundamentalist Christian students professing their desire to aid and minister to gays. After all, we can't allow discrimination against these students based on their religion, which is expressly protected by the Constitution. Of course, the idea of assistance to gays held by these fundamentalist students may turn out to be quite different from the views of the current gay and lesbian leaders of such a group.

As a result, the decision of the court below, and the doctrine advanced by Dale in this Court, would create a foundation for suppressing the freedom of all citizens to form private voluntary organizations to advance the moral principles in which they believe. It would constrain them instead towards advancing only the moral principles approved by the state.

Those who disagree with the current views and policies of the Boy Scouts regarding homosexuality should start their own similar organization for boys. They can then promote their own values through that organization and we

can see how the public responds in the marketplace of ideas. That is how the issue would be handled in a truly free society.

B. The Decision Below Contradicts the Established Precedents of this Court Regarding Freedom of Speech and Freedom of Association.

Fortunately, the established precedents of this Court make clear that the decision of the court below is in error. Based on these precedents, the decision below violates the Constitution in at least three ways. First, the decision violates the freedom of speech of the Boy Scouts. Secondly, the decision violates the right to expressive association of the Boy Scouts. Thirdly, the decision violates the Boy Scouts' right to intimate association.

1. The Decision Below Violates the Right to Freedom of Speech of the Boy Scouts.

As discussed above, forcing the Boy Scouts to retain Dale as a uniformed adult leader, an Assistant Scoutmaster, when he openly challenges, by word and deed, values the organization is trying to communicate to boy scouts cripples the ability of the organization to send its message. Rather, it forces the organization to send the contrary messages Dale wants to send. This is a clear violation of the First Amendment free speech rights of the Boy Scouts. *Hurley; Boyd v. Harding Academy of Memphis, Inc.* 88 F.3d 410 (CA6 1996); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (CA8 1987); *McConnell v. Anderson*, 451 F.2d 193(CA8 1971); *Harvey v. YWCA*, 533 F.Supp. 949 (W.D.N.C. 1982).

The main argument of respondent and the court below is that, incredibly, the Boy Scouts have no message regarding homosexuality. So forcing the Scouts to retain Dale as an adult leader would not affect the freedom of speech of the Scouts.

The idea that the message of the Boy Scouts is to be defined by a gay activist litigant and his lawyers rather than the organization itself is a quite remarkable new legal innovation. We do not have in this case a runaway rump group of the Boy Scouts dismissing Dale based on some peculiar misinterpretation of scouting. The decision of the local Monmouth Council of Boy Scouts is fully supported by the national Boy Scouts of America, which is, in fact, a defendant in this case. Their stance reflects a longstanding and settled Boy Scout position. It is quite consistent with the overall Boy Scout doctrine supporting traditional values, including marriage and fatherhood, and should come as no surprise.

Indeed, the Boy Scouts have fought for this position in other litigation around the country. They have also long denied other Boy Scout leadership positions on the same grounds as they have dismissed Dale here. See, e.g., (JA 551-53; JA 554-55); *Boy Scouts of America v. Teal,* 374 F. Supp. 1276, 1279n. 2 (E.D. Pa 1974). Other than the court below, no other Federal or state Supreme Court has attempted to redefine the Boy Scouts to fit some politically correct notion. Rather, they have all accepted that the position of the Boy Scouts of America is what the organization says it is.

Contrary to the representations of respondent Dale, there was no factual finding in the courts below that the Boy Scouts do not hold any common position on homosexuality. At the trial stage, this case was decided for the Boy Scouts on cross-motions for summary judgment. Surely the appellate courts could not find on this record that there is not even an issue of material fact as to the position of the Boy Scouts on homosexuality.

Though there may be some dissenters from this Boy Scout position within the organization, that does not change the fact that the organization has an established position and message regarding homosexuality. Just about every organization will have some dissenters on positions

regarding major controversial issues. That does not deprive the organization of the constitutional protection of freedom of speech on those issues.

Indeed, the argument of Dale and the court below that the presence of dissenters within the Boy Scouts nullifies the organization's freedom of speech on this issue shows just how restrictive and oppressive their doctrine is. Respondent Dale argued in opposing certiorari in this case that "the members of Scouting do not all share the same sexual morality or conception of the terms 'morally straight' or 'moral fitness', nor do they come together for expression regarding that which divides them." Brief in Opp. 16. In other words, the constitutional protection of freedom of speech applies only to organizations whose members have a unanimous view on an issue. This could not make more clear why the doctrine of Dale and the court below threatens the freedom of organizations to promote traditional values and all other values across the board.

Moreover, even if the Boy Scouts did not have an established message regarding homosexuality, the organization could still choose not to send the message that retaining a gay activist as a uniformed adult scout leader would send. As discussed above, an adult scout leader serves as a role model for the boys. The First Amendment protects the decision of the Boy Scouts that they do not want a gay activist touting the morality of homosexuality as a role model for their boys. Retaining Dale as an adult leader under these circumstances would amount to a Boy Scout endorsement of the acceptability of his moral view, which the Scouts have a constitutionally protected free speech right to decline.[6]

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[6] Respondent objects that allowing the Scouts to dismiss Dale on these grounds would punish him for who he is rather than what he says or does. Brief in Opp. 25. But as a gay activist publicly promoting the morality of homosexuality, the problem is exactly what Dale says and does. The Boy Scouts do not even have any direct knowledge as to whether Dale is gay, apart from what he says and does.

Hurley could not more clearly support precisely this analysis. In that case, this Court held unanimously that forcing private organizers of a St. Patrick's Day parade to include the Gay, Lesbian and Bisexual Group of Boston (GLIB) under a state antidiscrimination statute was unconstitutional. Such forced participation, the Court said, "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message," which includes the right to decide "what not to say". 515 U.S. at 573.

The parade organizers in *Hurley* did not have "a specific expressive purpose" 418 Mass. 238, 249, 636 N.E.2d 1293, 1299 (1994) (trial court below), or a "narrow, succinctly articulable message"515 U.S. at 569, as Dale and the court below have insisted are necessary in this case. The parade organizers certainly did not have any message regarding homosexuality. Nevertheless, the organizers could deny participation by GLIB simply because they did not want to send the message that such participation would send.

The Court found that the parade organizers could decline GLIB's participation, even though GLIB would merely carry a banner stating its identity and not make any other statement. Through such participation, GLIB would still send the message of "celebrat[ing] its members identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants." Id. at 570. The parade organizers had a first amendment right to decide that they did not want to include the GLIB message "bear[ing] witness to the fact that some Irish are gay, lesbian, or bisexual" and the implicit moral "view that people of their sexual orientations have as much

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Respondent also complains that non-gay Scout leaders are retained regardless of what views they express on homosexuality or other moral issues and the effect this has on their service as role models. Brief in Opp. 16, 25. But the Boy Scouts do dismiss other leaders for failure to propound the organization's views and moral code correctly or for other failings that undermine their ability to function as valid role models. (38a; JA 299-303; JA 694-95; JA751-52.)

claim to unqualified social acceptance as heterosexuals." Id. at 579.

Analogously, even without a Boy Scout position on homosexuals, the Boy Scouts could refuse to retain Dale as a uniformed adult Boy Scout leader, an Assistant Scoutmaster, even if Dale would merely express self-identification in that role. In the context of an organization explicitly designed for the moral education of boys, that would even more powerfully send a message regarding the moral equivalence of homosexual conduct. Surely the Boy Scouts are free under the First Amendment to choose not to send that message to their boys. When Dale goes further, and publicly proclaims his plan to use his position to discredit the Boy Scout position on homosexuality, far more clearly than even in *Hurley* the Boy Scouts may reject that message.[7]

2. The Decision Below Violates the Right to Expressive Association of the Boy Scouts.

As discussed above, the purpose of the Boy Scouts is to teach the boys sound moral values, including the traditional values regarding marriage, fatherhood, and sex. To force the Boy Scouts to accept Dale as a uniformed adult leader violates the group's right to associate with whom they want in order to send the messages they want. *Hurley; Democratic Party of United States v. Wisconsin ex. rel. LaFollette*, 450 U.S. 107, 122 (1981); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *New York State Club Ass'n v. City of New York*, 487

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[7] Respondent repeatedly attempts to distinguish *Hurley* on the grounds that it is a "pure free speech" case. Brief in Opp. 20, 21, 28. But no one was giving speeches in the *Hurley* parade. Participation in that parade was an expressive act like participation in Boy Scouts. Indeed, participation in Boy Scouts arguably involves more expression, because the Boy Scouts is designed to send particular moral messages, which the parade in *Hurley* was not.

U.S. 1 (1988); *Roberts v. United States Jaycees,* 468 U.S. 609, 633 (1984) (Justice O'Connor concurring wrote, "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). *See also Minnesota State Bd. For Community Colleges v. Knight,* 465 U.S. 271 (1984).

If the Boy Scouts retain a gay activist as a uniformed adult leader, that sends a clear message about the organization's values. It teaches the boys in the organization certain values regarding the morality of sexual conduct. But these are not the messages and values the organization wants to teach. Indeed, they are the opposite of the traditional moral values the organization seeks to communicate. To force the organization to retain as a uniformed adult leader someone who confounds its message by sending a directly contrary one is an exact violation of constitutionally protected freedom of association.

The main argument of the court below on this issue is the same as on the free speech issue – the Boy Scouts have no message or doctrine regarding homosexuality.[8] Consequently, the ability of the Boy Scouts "to disseminate its message is not significantly affected by Dale's inclusion." (52a.) Also, with no Boy Scout message regarding homosexuality, forcing the Scouts to reappoint Dale as an adult leader would not require the organization to abandon or alter its expressive activities or message, and would not impose any serious burden on the Boy Scouts' expression or

[8] In denying the Boy Scouts protection of the right to expressive association, the Court below said "Boy Scout members do not associate for the purpose of disseminating the belief that homosexuality is immoral" and "Boy Scouts discourages its leaders from disseminating *any* views on sexual issues." (52a.) The court also again supported this position by arguing that some Boy Scout members dissent from its position on homosexuality, saying, "Boy Scouts includes sponsors and members who subscribe to different views in respect of homosexuality." Id.

association. Moreover, without a Boy Scout position on homosexuality, Dale has no manifest view contrary to the Boy Scout message.

This shows how important the rewriting of the Boy Scouts' message by the court below and Dale is to their argument in this case. But the contention that the Scouts have no message regarding homosexuality has already been thoroughly rebutted in the discussion of the free speech issue above. Not only do the Scouts have a longstanding position that is directly contradicted by Dale, the Scouts also have the right in any event to decline the message Dale's adult leadership would send.[9]

3. The Decision Below Violates the Right to Intimate Association of the Boy Scouts.

Boy Scout activities involve private, intimate associations between family, friends, and neighbors. Boys participate in the organization through Boy Scout troops usually ranging from 15 to 30 boys. These Scout troops take private hikes and camp out together in remote areas. Scouts and their leaders engage in personal communications on moral and intimate subjects. Their meetings are closed to outsiders except during periods when prospective recruits and their parents may attend. No commercial or business activities are involved. Individual troops are not required to accept all boys that apply, but may exercise discretion based

[9] Respondent quotes the Boy Scouts as stating, "Neither the charter nor the bylaws of the Boy Scouts of America permits the exclusion of any boy." Brief in Opp. 2. But this is an expression of the openness of the Scouts to all boys regardless of race or ethnic background. It is not a waiver of the organization's right to a message on homosexual conduct. Indeed, boys as well as adult leaders who refuse to comply with the Scout Law or Oath will be denied membership. Moreover, Dale in any event is not a boy seeking Scout membership, but an adult demanding the adult leadership position of an Assistant Scoutmaster.

on size of the troop, commitment to the program by applicants, compatibility, and other factors.

Outsiders should have no right to force their way into such a private, intimate group. Doing so by force of the state violates a basic constitutional right of citizens and groups to choose their own intimate associations. We agree with petitioners that if the Boy Scouts do not qualify for constitutional protection as a private intimate group then no group other than a family would.

The court below rejected the intimate association defense because the "large size, nonselectivity, inclusive rather than exclusive purpose, and practice of inviting or allowing nonmembers to attend meetings, establish that [the Boy Scouts] is not 'sufficiently personal or private to warrant constitutional protection' under the freedom of intimate association." (48a.)

This analysis is plainly erroneous. While millions of boys and adult leaders belong to the Boy Scouts nationwide, the experience of each boy in the organization takes place in the context of a Boy Scout troop of 15 – 30 boys and a few adult leaders. While the Boy Scouts are nonselective in terms of race, or ethnic background, or religion (as long as the boys and adult leaders believe in God), the Boy Scouts are quite selective in the terms relevant here. The Scouts will not accept as adult leaders individuals who cannot promote the organization's moral code by word, deed, and example. Similarly, the Scouts will not accept as members boys who refuse to comply with the Scout Oath and Law. The Scouts are inclusive as to the former issues (race, ethnic background, or religion), but exclusive as to the latter issues (ability to promote and exemplify the organization's moral code), which again are what is relevant here. Lastly, the Boy Scouts do not allow nonmembers to attend meetings except for the purpose of recruitment. Otherwise, among

nonmembers, only families of member boys have limited participation, primarily attendance at award ceremonies.[10]

Finally, most frighteningly, the court below and respondent Dale argue that even if compelling the Boy Scouts to reappoint Dale as a uniformed adult leader violates the organization's rights to freedom of speech and expressive and intimate association, such compulsion is justified because the state has a compelling interest in eradicating discrimination. (63a-64a.) But the Boy Scouts are not engaged in wrongful discrimination. They are engaged in the promotion of traditional values. And, despite the fulminations and obvious prejudices of the court below, the state does not have a compelling interest in the eradication of such traditional values or their promotion. This argument merely displays most powerfully why the decision below is a threat to the freedom of Americans to advance traditional values or, indeed, any other values that may be politically incorrect at the time.

Dale, in fact, has no interest in serving as a Boy Scout leader that would remotely come close to outweighing the rights of the Boy Scouts. The Boy Scout organization is for the boys, not for the Scout leaders. The point of the organization is to teach the boys sound moral values, help them develop bonds with friends, neighbors, and their community, and foster enjoyable experiences for them such as camping trips. The organization is not a vehicle for

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[10] Respondent argues that the Boy Scouts are perfectly analogous to a Rotary club, which this Court has found does not qualify for the right to intimate association. *Rotary*, 481 U.S. at 546-47. But, critically, Rotary clubs are not focused on the moral upbringing, education, and supervision of children. The Boy Scouts are, and the freedom of intimate association is essential to carrying out these purposes properly and effectively. Moreover, the exclusionary practices of the Rotary clubs challenged in *Roberts* were not related to the self-described general philosophy of the organization, unlike this case. Finally, unlike the Boy Scouts, Rotary clubs are organizations for adults and have a substantially commercial purpose and effect. So exclusion of adult members from such clubs presents issues that exclusion from adult leadership in the Boy Scouts does not.

advancing the personal interests of adult Scout leaders, commercial or otherwise. Parents and neighbors may enjoy serving as Scout leaders to provide service to their local community and its children, but that pales to insignificance compared to the core liberty interests of the Boy Scouts discussed above. Moreover, Dale has many other avenues for serving his local community.

In fact, the only interest Dale has asserted in forcing his reappointment as a uniformed adult Scout leader is his desire to impose his own, differing values on the organization. Again, he says that through his forced leadership role he wants to point out to the Boy Scouts "how bad and wrong" their policy regarding homosexuality is. That is not a valid, legitimate interest to outweigh the liberty interests of the Boy Scouts discussed above.

CONCLUSION

For all of the reasons above, the American Civil Rights Union urges this Court to reverse the decision of the court below and dismiss this case.

Respectfully Submitted,

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